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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

SHEET METAL WORKERS' NATIONAL PENSION FUND and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, individually and as Lead Plaintiffs on behalf of all others similarly situated, and

INTERNATIONAL UNION OF OPERATING
ENGINEERS PENSION FUND OF EASTERN
PENNSYLVANIA AND DELAWARE,
individually and as Named Plaintiff, on behalf of
all others similarly situated,

Plaintiffs,

V.

BAYER AKTIENGESELLSCHAFT, WERNER BAUMANN, WERNER WENNING, LIAM CONDON, JOHANNES DIETSCH, and WOLFGANG NICKL

Defendants.

Case No.: 3:20-cv-04737-RS

**DEFENDANTS' OBJECTION
TO NEW EVIDENCE
ACCOMPANYING PLAINTIFFS'
REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR CLASS
CERTIFICATION**

CLASS ACTION

Date: April 13, 2023

Time: 1:30 p.m.

Judge: Richard Seeborg

Courtroom: 3 — 17th Floor

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INTRODUCTION

In moving to certify a class for this Section 10(b) action, Plaintiffs made a strategic decision to present limited evidence and virtually no briefing on the topic of extraterritoriality. While their pleadings allege fraud arising out of 21 purchases of Bayer securities, Plaintiffs submitted an expert report analyzing just 7 of those trades — coupled with an unsupported opinion that the remaining 14 were likewise executed in the United States. *See* Dkt. No. 141-2 (“Mitts Report”). Now, nearly five months later and just weeks before the Court is scheduled to hear argument on their motion, Plaintiffs have finally provided the rest of their expert’s analysis: A 47-page “reply” report that addresses the previously omitted trades by applying a newly minted methodology to never-before-considered documents. *See* Dkt. No. 164-1 (“Mitts Reply”).

11 Plaintiffs' belated submission of affirmative evidence is improper and prejudicial.
12 Accordingly, pursuant to Local Rule 7-3(d)(1), Defendants object and respectfully request that the
13 Court disregard all portions of the Mitts Reply that are based on new affirmative evidence and
14 arguments.¹ Alternatively, to the extent the Court is inclined to consider this new evidence,
15 Defendants respectfully request that the Court grant their forthcoming motion for leave to file sur-
16 reply papers in response.

PROCEDURAL BACKGROUND

18 On October 28, 2022, Plaintiffs moved to certify a class of investors who purchased Bayer
19 American Depository Receipts (ADRs). In support of that motion, Plaintiffs submitted an expert
20 report on extraterritoriality, prepared by Prof. Joshua Mitts, Ph.D. *See generally* Mitts Report.
21 Four pages of the report addressed whether Plaintiffs' alleged trades were conducted in the United
22 States, with only seven transactions discussed. *See id.* ¶¶ 41-50. Plaintiffs briefed the issue in a
23 footnote that did not cite this Circuit's governing standard. Dkt. No. 140 at 11 n.3.

24 Defendants opposed class certification and submitted a rebuttal expert report from ADR
25 trading expert Cristian Zarcu. Dkt. No. 151-29. Mr. Zarcu provided detailed analysis of each of

²⁷ Defendants specifically object to Paragraphs 8, 15, 30, 32 (lines 9 through 14), 33 (lines 7
28 through 10), 34-35, 45-47, 48 (lines 10 through 13), 62, 64-69, 71-73, 75-83, 85-88, 90-96, 98-
103, 105-08, 110-14, and 116-20 of the Mitts Reply.

1 Plaintiffs' alleged ADR purchases and concluded based on his industry experience and review of
 2 contemporaneous records that liability was incurred overseas for 18 of the trades. *Id.*

3 On March 21, 2023, Plaintiffs filed a reply brief in support of class certification, featuring 9
 4 pages of new argument on extraterritoriality. Dkt. No. 163. Accompanying that reply brief was a
 5 47-page, 124-paragraph "Rebuttal Expert Report" from Prof. Mitts, likewise presenting new
 6 argument and analysis. *See generally* Mitts Reply. Defendants now lodge their objections to this
 7 new evidence.

8 DISCUSSION

9 In seeking class certification, Plaintiffs bore the burden of affirmatively demonstrating that
 10 the proposed class meets the requirements of Federal Rule of Civil Procedure 23. *Wal-Mart*
 11 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs were obliged to carry this burden in
 12 their opening submissions. *See, e.g., In re Flash Memory Antitrust Litig.*, 2010 WL 2332081, at
 13 *15 (N.D. Cal. June 9, 2010) (sufficient evidence must be advanced in "moving papers in order to
 14 afford Defendants a full and fair opportunity to respond"); *Wheeler v. Estee Lauder Cos.*, 2013
 15 WL 12121543, at *3 (C.D. Cal. Feb. 12, 2013) (denying class certification where plaintiffs
 16 attempted to "cure th[e] defect" in their motion "by submitting . . . evidence in their Reply"); *see also*
 17 *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider
 18 arguments raised for the first time in a reply brief.").

19 Prof. Mitts' opening report asserted that "irrevocable liability for purchases by the
 20 Plaintiffs was incurred in the United States, and as such, the Plaintiffs' purchases were typical of
 21 Class Members." Mitts Report ¶ 41. However, Prof. Mitts provided supporting analysis for only
 22 seven of these alleged purchases. *Id.* ¶¶ 42-48. The Mitts Report thus lacked any affirmative
 23 discussion of Plaintiffs' other transactions, including all trades alleged by one of the Lead
 24 Plaintiffs, Sheet Metal Workers' National Pension Fund.

25 The missing evidence did not come until the Mitts Reply, where Prof. Mitts belatedly
 26 addressed the omitted trades. Across pages and pages of dense discussion, Prof. Mitts finally set
 27 out his explanation of the documentary record, addressing new documents under a new
 28 "methodology" that was nowhere described in his opening report. Mitts Reply ¶ 30. Along the

1 way, Prof. Mitts also disclosed, for the first time, that his conclusions turned on an interpretation
 2 of customer agreements between Plaintiffs' investment managers and their broker dealers —
 3 contracts that he had never before identified as a basis for his opinions. *Compare, e.g.*, Mitts
 4 Reply ¶¶ 64, 71, 88, 105 (discussing and interpreting broker-customer agreements), *with* Mitts
 5 Report, App'x B (failing to disclose broker-customer agreements as “[d]ocuments [c]onsidered”).

6 By holding back Prof. Mitts' analysis and reliance materials, Plaintiffs deprived
 7 Defendants of the opportunity to substantively respond. To avoid prejudice, the Court may
 8 properly decline to entertain such evidence. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.
 9 1996) (“[W]here new evidence is presented in a reply to a motion for summary judgment, the
 10 district court should not consider the new evidence without giving the [non-]movant an
 11 opportunity to respond”); *Gearing v. City of Half Moon Bay*, 2021 WL 4148663, at *10 (N.D. Cal.
 12 Sept. 13, 2021), *aff'd*, 54 F.4th 1144 (9th Cir. 2022) (declining to rely upon reply evidence subject
 13 to an objection asserting that it addressed “matters which should have been foreseen and addressed
 14 in connection with [the] original filing”). Defendants respectfully submit that the Court should
 15 disregard the new affirmative evidence included in the Mitts Reply.

16 In the alternative, if the Court is inclined to consider Plaintiffs' new evidence, Defendants
 17 respectfully request an opportunity to address Prof. Mitts' new-on-reply opinions and Plaintiffs'
 18 related arguments. *See Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir.
 19 2018) (“Mitigation of any unfairness, following objection, may take the form of granting the
 20 objecting party leave to file a sur-reply opposition to the new matter.”). To facilitate the Court's
 21 consideration of this alternative remedy, Defendants intend to submit an administrative motion by
 22 April 3, 2023 seeking leave to file sur-reply papers, accompanied by a proposed sur-reply report
 23 under preparation by Mr. Zarcu.

24 CONCLUSION

25 For the foregoing reasons, Defendants respectfully request that the Court disregard the new
 26 evidence and analysis contained in the Mitts Reply or, in the alternative, grant Defendants'
 27 forthcoming motion for leave to respond through sur-reply.
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1 Dated: March 28, 2023
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3 By: /s/ Jordan Eth
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